IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 63064-4-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	UNPUBLISHED OPINION
	)	
TREVOR LEE WEST,	)	
	)	
Appellant.	)	FILED: July 6, 2010

Grosse, J. — The failure to object at trial to a witness's comment as an impermissible opinion precludes appellate review of the comment absent a showing that it is a manifest constitutional error. Here, during trial on a charge of attempting to elude a pursuing police vehicle, the trooper testified that the defendant's explanation for not stopping was "comical." While the defendant asserts for the first time on appeal that this comment was an impermissible opinion that violated his right to a jury trial, he fails to show that it is a manifest constitutional error warranting review. This was not an explicit statement on an ultimate issue of fact nor did it have any practical or identifiable consequences at trial. Accordingly, we affirm.

FACTS

At approximately 9:00 p.m. on August 24, 2007, Washington State Patrol Trooper Keith Leary was on duty travelling southbound on Interstate 5 (I-5) near the exit to Interstate 405 (I-405). Leary was driving a black Chevrolet Impala that was not marked with a police emblem and did not have a light bar attached to the roof. But it was equipped with red and blue lights in the front grille and on the windshield, strobe lights in the rear window, and "wig-wag" lights in the rear tail lights. It was also

equipped with a siren.

As Leary approached the exit to I-405, he saw a grey Nissan car cut across traffic in front of his car, cross the gore point (the portion that separates the exit lanes from the rest of the traffic lanes) and take the exit to southbound I-405. As the driver of the Nissan passed in front of the trooper's car, he threw a cigarette out of the driver's window that bounced off the hood of the trooper's car. Leary then followed the Nissan and activated his lights in the corner of the exit ramp to signal the driver to stop.

The driver of the Nissan slowed down, but continued driving while the trooper followed with his lights flashing. Leary saw the driver turn around and look back at him, but he kept driving. When the Nissan did not pull over, Leary activated his siren but the Nissan continued driving and picked up speed. At this point, they were both traveling on southbound I-405 in light to moderate traffic. The Nissan nearly collided with other cars on the road as it drove onto the shoulder to pass and made other unsafe lane changes. Leary moved to the left lane to avoid colliding with other cars on the road. Leary continued to follow the Nissan for about three miles and both cars drove up to 80 miles per hour at one point.

As they approached the exit to State Route 527 (SR 527), Leary notified police communications and other officers nearby that he intended to discontinue the pursuit if the Nissan exited the freeway at SR 527. The Nissan then exited at SR 527 and two other troopers were at the top of the exit ramp, one of them blocking the ramp with his patrol car. When the Nissan approached, it pulled over and stopped. The driver put his hands up and exited the car as directed by the police. He was arrested and

identified as Trevor West. When Leary asked West if he had seen the police lights on his car behind him, West responded, "Man, I thought you were my friend, Corey, that was trying to get me," and said his friend drove a car similar to the trooper's car.

The State charged West with one count of attempting to elude a pursuing police vehicle. The only evidence presented at trial was the trooper's testimony. A jury found him guilty as charged. West appeals.

ANALYSIS

West first contends that the trooper's testimony that he thought West's explanation for not stopping was "comical" was an impermissible opinion on his guilt. The comment was made during direct examination when the prosecutor asked the trooper about statements West made after he was arrested:

> Q: Do you remember what the extent of that conversation was?
> A: There was not a whole lot of conversation. He made a reference to he thought it was a buddy of his following him, which I thought was kind of comical, myself. There's not many people that drive around -- .

West then objected, stating, "[c]alls for speculation," and the trial court sustained the objection.

The State contends that because West failed to object to this testimony as an impermissible opinion at trial, he may not now challenge it on this basis because he fails to show it is a manifest constitutional error. We agree.

A party who objects to evidence on one ground may not raise a second ground for that objection on appeal.[1] Thus, because West did not object to the testimony as an impermissible opinion, he may only raise this issue for the first time on appeal if he

[1] See State v. Mason, 160 Wn.2d 910, 933, 162 P.3d 396 (2007), cert. denied, 553 U.S. 1035, 128 S. Ct. 2430, 171 L. Ed. 2d 235 (2008).

demonstrates that it is a manifest constitutional error.[2] To so do, he must identify a constitutional error and show how the alleged error actually affected his rights at trial. "It is this showing of actual prejudice that makes the error 'manifest,' allowing appellate review."[3]

West contends that because the trooper's testimony was a mockery of his defense, it was an impermissible opinion on his guilt and therefore violated his constitutional right to a jury trial. We disagree.

A defendant's constitutional right to a jury trial includes the right to an independent determination of the facts by the jury.[4] Thus, allowing impermissible opinion testimony about the defendant's guilt violates that right.[5] But "[a]dmission of witness opinion testimony on an ultimate fact, without objection, is not automatically reviewable as a 'manifest' constitutional error. [Rather, 'm]anifest error' requires a nearly explicit statement by the witness."[6] As our Supreme Court has explained:

> Requiring an explicit or almost explicit witness statement on an ultimate issue of fact is consistent with our precedent holding the manifest error exception is narrow.
>
> Requiring an explicit or almost explicit statement by a witness is also consistent with this court's precedent that it is improper for any witness to express a personal opinion on the defendant's guilt.[7]

Here, the trooper's comment expressed skepticism about West's statement that he thought he was being followed by his friend. While arguably this was an indirect

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[2] State v. Kirkman, 159 Wn.2d 918, 936, 155 P.3d 125 (2007).
[3] Kirkman, 159 Wn.2d at 926-27.
[4] Kirkman, 159 Wn.2d at 927.
[5] Kirkman, 159 Wn.2d at 927.
[6] Kirkman, 159 Wn.2d at 936.
[7] Kirkman, 159 Wn.2d at 936-37 (citations omitted).

comment on the credibility of West's story, it does not rise to the level of an explicit statement on an ultimate issue of fact or West's guilt.[8] Thus, West fails to establish that the trooper's comment amounts to a manifest constitutional error that may be reviewed for the first time on appeal.[9]

West next challenges the constitutionality of the eluding statute, contending that it contains an affirmative defense that impermissibly shifts the burden of proof to the defendant. The statute provides:

> (1) Any driver of a motor vehicle who willfully fails or refuses to immediately bring his vehicle to a stop and who drives his vehicle in a reckless manner while attempting to elude a pursuing police vehicle, after being given a visual or audible signal to bring the vehicle to a stop, shall be guilty of a class C felony. The signal given by the police officer may be by hand, voice, emergency light, or siren. The officer giving such a signal shall be in uniform and the vehicle shall be equipped with lights and sirens.
>
> (2) It is an affirmative defense to this section which must be established by a preponderance of the evidence that: (a) A reasonable person would not believe that the signal to stop was given by a police officer; and (b) driving after the signal to stop was reasonable under the circumstances.[10]

West contends that the affirmative defense impermissibly shifts the burden of proving the implied element of knowledge to the defendant. He relies on State v. Stayton, which held that the eluding statute included an implied element that the

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[8] Contrast State v. Barr, 123 Wn. App. 373, 382, 98 P.3d 518 (2004) (impermissible opinion where officer testified that defendant's behavior indicated deception and that he had the training to determine guilt from a suspect's behavior); State v. Jones, 71 Wn. App. 798, 812, 863 P.2d 85 (1993) (impermissible opinion where victim advocate testified that "I felt that this child had been sexually molested by [the defendant.]").

[9] We further note that even if West could show that the comment amounted to a constitutional violation, he fails to establish that it had any practical or identifiable consequences at trial and was therefore "manifest" error. The trial court in fact sustained an objection to this testimony—albeit on a different basis—and the jury was properly instructed that they were the "sole judges of the credibility of each witness."

[10] RCW 46.61.024.

defendant knew he was being signaled to stop by a police officer.[11] West contends that because the affirmative defense requires the defendant to disprove that he knew he was being signaled to stop by a police officer, it impermissibly shifts the burden of proving the implied element of knowledge.

But West did not assert the affirmative defense in this case or offer any evidence in his defense. Indeed the only evidence offered at trial was the trooper's testimony presented by the State. Nor was a jury instruction on the affirmative defense requested or given; rather, the court instructed the jury as follows:

> To convict the defendant of attempting to elude a police vehicle, each of the following elements of the crime must be proved beyond a reasonable doubt:
> (1) That on or about the 24th day of August, 2007, the defendant drove a motor vehicle;
> (2) That the defendant was signaled to stop by a uniformed police officer by hand, voice, emergency lights, or siren;
> (3) That the signaling police officer's vehicle was equipped with lights and siren;
> (4) That the defendant willfully failed or refused to immediately bring the vehicle to a stop after being signaled to stop;
> (5) That while attempting to elude a pursuing police vehicle, the defendant drove his vehicle in a reckless manner; and
> (6) That the acts occurred in the State of Washington.

The jury was further instructed that "[a] person acts willfully when he or she acts knowingly," and that "[t]he State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists as to these elements."

Thus, not having asserted the affirmative defense in this case, West cannot

[11] 39 Wn. App. 46, 691 P.2d 596 (1984). Stayton was decided before the statute was amended in 2003 to include the affirmative defense and to eliminate the requirement that the pursuing vehicle be marked as an official police vehicle. See Former RCW 46.61.024 (1982).

challenge the constitutionality of the statute in this manner.[12] Even if he were able to properly challenge the statute as unconstitutionally shifting the burden of proof, he fails to show that he was denied the proper remedy: the jury was instructed that the State alone bore the burden of proving each element of the charge, including any implied element of knowledge.[13]

We affirm.

Grosse, J.

WE CONCUR:

Lau, J.

Cox, J.

[12] While West noted at oral argument that he raised this issue in the form of a motion to dismiss in the trial court, he nonetheless declined to assert the affirmative defense after the trial court denied the motion, stating in his trial memorandum: "The defense does not want the affirmative defense imposed, but would like to argue lack of knowledge, consistent with Stayton."

[13] See State v. Hicks, 102 Wn.2d 182, 187, 683 P.2d 186 (1984) (where affirmative defense negates an element, remedy is to place the burden of proof on the prosecution to prove absence of the defense).